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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000030-001 DT 06/08/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA SETH W PETERSON

v.

CYNTHIA JUNG HALLAS (001) GREG CLARK

REMAND DESK-LCA-CCC
SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number m–0751–TR–2010–015557.

Defendant-Appellant Cynthia Hallas (Defendant) was convicted in Scottsdale Municipal Court of driving under the influence. Defendant contends the prosecutor vouched for the credibility of a witness. For the following reasons, this Court affirms the judgment and sentence.

I. FACTUAL BACKGROUND.

On May 21, 2010, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); failure to drive in one lane, A.R.S. § 28–729(1); and no license plate lamp, A.R.S. § 28–925(C). Prior to the start of the trial, the parties stipulated Defendant's BAC at midnight on May 22, 2010, was 0.119. (R.T. of Jan. 27, 2011, at 10.) At the trial, Officer Anthony Bellissimo testified he was on duty on May 21, 2010, assigned to the DUI Squad. (*Id*. at 34, 36.) At 11:09 p.m., he saw a red Infiniti exit from Mercer Lane and turn right to go north on Scottsdale Road. (*Id*. at 38.) Rather than turn into the number 3 (curb) lane, the vehicle turned into the number 2 (middle) lane. (*Id*. at 38–39.) The vehicle proceeded north going 30 to 35 mph in the 45 mph zone and then moved into the number 3 lane. (*Id*. at 39, 41.) As the vehicle approached Jenan Road, it suddenly moved (without signaling) into the left-turn lane and made a U-turn to go south on Scottsdale Road. (*Id*. at 41–42, 141.) When it made that U-turn, it went into the number 2 lane, but then drifted into the number 1 lane. (*Id*. at 42–43.) When it approached Shea Boulevard, it moved into the left-turn lane and waited because the light was red. (*Id*. at 43–44.) Once the light turned green, the vehicle just sat there, and after about 10 seconds, Officer Bellissimo honked his horn, and the vehicle made the left turn to go east on Shea Boulevard. (*Id*. at 44–45.) The vehicle turned into the number 3 (curb) lane and immediately made a right turn into the parking lot behind the buildings on the southeast corner of Scottsdale Road and Shea Boulevard. (*Id*. at 45, 130.) At that point, Officer Bellissimo activated his emergency lights to stop the vehicle. (*Id*. at 45–46.)

Once the vehicle stopped, Officer Bellissimo stopped his vehicle about a car length back, and had his high beams and emergency lighting illuminating the vehicle. (R.T. of Jan. 27, 2011, at 52, 132.) He immediately got out of his vehicle and approached the other vehicle, taking about 3 to 5 seconds to reach that vehicle. (*Id*. at 48–49, 53, 133–34.) As he approached, he could see the reflection of the driver in the driver's side mirror. (*Id*. at 132–33.) In the driver's seat was a female, whom he identified as Defendant. (*Id*. at 53, 57, 125.) He also saw a male in the passenger seat. (*Id*. at 54.) Both Defendant and the male passenger had their seat belts on, and the driver's seat was in the proper position for a person of Defendant's height of 5 feet 2 inches. (*Id*. at 54–55, 60, 83, 86, 125, 143.) Defendant's passenger was Shane Gregg, and he was 5 feet 10 inches tall. (*Id*. at 85.) Officer Bellissimo described Defendant's vehicle as having individual bucket seats with a center console and gear shifter in the console. (*Id*. at 144.) He testified DUI officers are trained to look for drivers and passengers switching places because, if that happens, both individuals would be considered to have been in control of the vehicle, and thus if both persons are intoxicated, the officer would have to arrest both persons for DUI, but in this case, he saw no switching of places. (*Id*. at 133, 135–36.) After Officer Bellissimo had Defendant exit the vehicle and perform some field sobriety tests, he placed her under arrest for DUI. (*Id*. at 82.)

On cross-examination, Officer Bellissimo acknowledged in his report he had Defendant's vehicle listed as an Integrity rather than an Infiniti. (R.T. of Jan. 27, 2011, at 108, 139.) He also acknowledged in his report he stated Defendant's vehicle turned right onto Shea Boulevard rather than Scottsdale Road. (*Id*. at 112–13, 138.)

Defendant testified and gave her version of what happened that night. (R.T. of Jan. 27, 2011, at 148, 150.) She described her vehicle as a 2004 Infiniti G35 sedan. (*Id*. at 149.) She said on that night, she had known Shane Gregg for 2 or 3 weeks, and he was the designated driver that night. (*Id*. at 151.) She contended she never drove her vehicle that night. (*Id*. at 151.) First they went to a restaurant at 56th Street and Camelback to meet her cousin and her cousin's fiancé. (*Id*. at 150–51.) From there they went to Shane's brother's house in the Raintree Drive/Loop 101 area. (*Id*. at 152.) Next they went to the Devil's Martini, which was previously identified as located at 10825 North Scottsdale Road, and stayed there about 1 hour. (*Id*. at 109, 152–53.) She said when they left, they did not leave via Mercer Lane, but instead left from a driveway south of the Devil's Martini, and turned left to go south on Scottsdale Road to the Dirty Dog Saloon, which is at 10409 North Scottsdale Road. (*Id*. at 153–54.) They stopped at the red light at Scottsdale Road and Shea Boulevard, and then headed south, but drove past the Dirty Dog Saloon. (*Id*. at 154–55.) They then made a U-turn and headed north, but again drove past the Dirty Dog Saloon, so they went to Shea Boulevard and turned right, and then turned right into the parking lot. (*Id*. at 155.)

Once they were in the parking lot, the officer put on his emergency lights to make the stop. (R.T. of Jan. 27, 2011, at 155.) While they were still moving, Shane said, "My license is suspended; oh, my God, I can't go to jail." (*Id*. at 157.) According to Defendant, Shane jumped from the driver's seat into the back seat, said "switch seats," grabbed Defendant under the arms, and

pulled her from the passenger seat into the driver's seat. (*Id*. at 158, 175–76.) Defendant said she did not have on her seat belt, the seat was in the back position, and her feet could not reach the pedals. (*Id*. at 160.) The officer then knocked on the window (which was still up), and asked for her driver's license and registration. (*Id*. at 158–61.) Defendant said, at that point, her legs were still "a little bit over the center console," but when she turned to face the officer, her "legs fell into position." (*Id*. at 162, 177–78.) She said she did not tell the officer she was not the driver because she "was in shock" and just "shut down." (*Id*. at 163, 179, 183.) She testified she had consumed alcohol to the extent she never would have driven in that condition. (*Id*. at 164.)

On cross-examination, Defendant admitted she was not telling the officer the truth when she said she had one glass of wine that night, and not telling the truth when she said she had only one glass of beer that night. (R.T. of Jan. 27, 2011, at 167.) She thus acknowledged she gave false information and was telling lies to the officer, and acknowledged she never told him she was not driving that night. (*Id*. at 187–88.) She stated, however, when the officer asked her how long she had been driving before she was stopped, she did not answer "[b]ecause I didn't want to lie." (*Id*. at 194.) She acknowledged her BAC was 0.119 that night and that she was intoxicated. (*Id*. at 167–68, 174.)

In the final argument, the prosecutor noted the State had to prove beyond a reasonable doubt that Defendant was driving the vehicle, and then outlined for the jurors the evidence showing Defendant was the driver. (R.T. of Jan. 28, 2011, at 223–30.) The prosecutor made no argument that Defendant was lying in what she said to Officer Bellissimo. (*Id*. at 227–33.)

In his final argument, Defendant's attorney began by arguing Officer Bellissimo was not truthful:

> And when I made that comment, I did so because I had already written down on that chart those areas that the officer had testified that he had reviewed in his report, that he had said that they were accurate and, therefore, truthful. We know they're not. We know that we're not dealing with a red Integrity. We know that this is an absolute impossibility. Had I not said anything, had I sat there, you would have been participating in this perfect world that they want you to buy into and believing what this officer had said as being truthful.
>
> And it's interesting to note, if the defense challenges the officer or challenges his testimony, it's a mistake. If the defendant says something that doesn't comport with their version, it's a lie.

(R.T. of Jan. 28, 2011, at 235–36.) Defendant's attorney again argued Officer Bellissimo was not truthful, but then argued Defendant was truthful:

> It would be different if, in fact, this was true, because it would suggest that this officer was absolutely infallible in this case and absolutely correct in his version of what happened. But, we know that that is not the case.

What's that do for me? Well, it certainly suggests that what Ms. Hallas has said to you on the stand is truthful.

(*Id*. at 237.)

A perfectly—in a perfect world, she would have had an answer for everything, but she didn't. She was truthful with you with respect to what she was doing, how she did it, how it happened.

(*Id*. at 239.)

Her version of events I'm asking you to consider because, once again, it's—it's perfectly plausible in this case. Given what the officer can and can't see, it's absolutely believable on her part.

(*Id*. at 240.)

In rebuttal, the prosecutor made three arguments to which Defendant's attorney objected:

She admitted that she knowingly, knowingly and deliberately, on purpose, gave false information to the officer as he was conducting his police investigation.

Mr. Clark said fallibility is critical. When an officer does it, it's a mistake; when she does it, it's a lie. No, that's what the evidence was here. He freely admitted when he wrote whichever it was, Integrity or Infiniti in the narrative, which might have been a spell check or something, but that was a mistake. He admitted that. That's a mistake. Why would he, if he was going to lie, if you want to turn that [into] a lie when he said she pulled onto Shea, why would someone lie about something that is so obviously impossible to do?

MR. CLARK: Objection, Judge, she's vouching now.

THE COURT: Sustained.

(R.T. of Jan. 28, 2011, at 253.)

She doesn't—because of her condition, she doesn't have the ability to recollect. He's noting this, calling it in, made a report, a typed [re]port which—a report which we know from Exhibit 2 that was marked yesterday that he refreshed his memory from a couple of times was at least five pages long, detailed report right after it happened. So, clearly, he had the superior ability to recollect—

MR. CLARK: Objection, Judge, she's vouching again.

MS. GAUDREAU: —the matters that happened.

THE COURT: Sustained.

MR. CLARK: I'd ask that it be stricken.

THE COURT: Ordered.

MS. GAUDREAU: You can decide who has the superior ability to recollect under the circumstances as each witnessed [*sic*] talked to you.

MR. CLARK: Once again, Judge, the same objection.

THE COURT: Sustained. Counsel—

MS. GAUDREAU: Because the jury has the—

MR. CLARK: I'd ask that it be stricken again.

THE COURT: They have the ability to figure out the credibility. That's their job.

(R.T. of Jan. 28, 2011, at 260.) Defendant's attorney did not, however, ask the trial court to grant a mistrial. (*Id*. at 260, 263–65.)

The jurors found Defendant guilty of both counts. (R.T. of Jan. 28, 2011, at 265–66.) The trial court found Defendant responsible for the two civil traffic violations. (*Id*. at 267.)

On February 3, 2011, Defendant's attorney filed a Motion for New Trial raising as one of the issues a claim that the prosecutor vouched for the credibility of the officer, and on February 4, 2011, the prosecutor filed a Response. The trial court advised the parties it wanted to have a transcript prepared of the final arguments. After the transcript was prepared, on August 15, 2011, the prosecutor filed a Supplemental Response. After hearing arguments by the attorneys, the trial court found the prosecutor's argument did not arise to vouching that would require a new trial, and thus denied Defendant's Motion for New Trial. (R.T. of Aug. 24, 2011, at 290–91.) On September 21, 2011, the trial court imposed sentence. On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. *Did the prosecutor's comments amount to vouching.*

Defendant contends the prosecutor engaged in vouching when discussing the testimony of Officer Bellissimo. Several cases have found impermissible vouching when the prosecutor gives his or her opinion of the strength of the State's case or the truthfulness of a witness's testimony. In *State v. Newell*, 212 Ariz. 389, 132 P.3d 833 (2006), the prosecutor told the jurors, "[N]o matter what defense counsel tells you, we all know that DNA is . . . the most powerful investigative tool in law enforcement at this time." The court found the prosecutor engaged in improper vouching because there had been presented no testimony about the strength of DNA evidence, and thus the statement "we all know" was an opinion about the strength of that evidence. *Newell* at ¶¶ 64–65. In *State v. Lamar*, 205 Ariz. 431, 72 P.3d 831 (2003), the court found the prosecutor engaged in improper vouching by saying "that sounds like a truthful statement." *Lamar* at ¶¶ 53–54. In *State v. Leon*, 190 Ariz. 159, 945 P.2d 1290 (1997), the prosecutor told the jurors, "When the police have charged or arrested an individual, the County Attorney's Office reviews to determine if there is [sic] sufficient grounds to charge." The court found the prosecutor engaged in improper vouching because that was in effect an opinion of the strength of the State's case. 190

Ariz. at 162, 945 P.2d at 1293. And in *State v. Duzan*, 176 Ariz. 463, 862 P.2d 223 (Ct. App. 1993), the court found the prosecutor engaged in improper vouching by saying to the jurors, "I stand before you and tell you that [the defendant] is [a scheming, manipulative person]." 176 Ariz. at 466–67, 862 P.2d at 226–27.

Other cases have found no vouching when the prosecutor ties the comments to the evidence presented. In *State v. Lee*, 185 Ariz. 549, 917 P.2d 692 (1996), the prosecutor said in final argument about one witness "[n]ow she's been, I think, honest when she says she wasn't even aware that [other witnesses] had seen her," and said about another witness "I think he was an honest man, certainly an honest man, but I think he made an honest mistake." The court found no vouching because the prosecutor was essentially conceding the witnesses had been mistaken in parts of their testimony, and because the statement was more about the physical evidence at the scene than about the witness's testimony. 185 Ariz. at 554, 917 P.2d at 697. In *State v. King*, 180 Ariz. 268, 883 P.2d 1024 (1994), the prosecutor said in opening statement "I can't guarantee you what Mr. Michael Page Jones is going to say when he gets on the stand, ladies and gentlemen, but he was there that night and he has information, and I suggest to you that if he testifies truthfully as he should, he will implicate the defendant, Eric King, without a doubt." The court found no vouching because the prosecutor was voicing his expectation that Jones's testimony would be consistent with the earlier statements he made to the police, but it was possible Jones might lie. 180 Ariz. at 276–77, 883 P.2d at 1032–33. In *State v. Zinsmeyer*, 222 Ariz. 612, 218 P.3d 1069 (Ct. App. 2009), the prosecutor said in final argument "the state is satisfied the burglary with the motor vehicle and what tool is it?" The court found no vouching because that was nothing more than an assertion the State had presented sufficient evidence a burglary had occurred, followed by argument that the defendant had committed the burglary with tools found in the truck. *Zinsmeyer* at ¶ 18. And in *State v. Corona*, 188 Ariz. 85, 932 P.2d 1356 (Ct. App. 1997), the prosecutor stated the officers "testified truthfully." The court found no vouching because "the prosecutor made clear that it was for the jury to 'determine the credibility of' the witnesses and her characterization of the witnesses as truthful was sufficiently linked to the evidence." 188 Ariz. at 91 & n.6, 932 P.2d at 1362 & n.6.

In the present case, for the first statement to which Defendant's attorney objected, the prosecutor was asking the jurors to assess the credibility of Officer Bellissimo based on the evidence presented about the location of the streets. (R.T. of Jan. 28, 2011, at 253.) For the second statement to which Defendant's attorney objected, the prosecutor was asking the jurors to assess the strength of Officer Bellissimo's memory based on the report admitted in evidence. (*Id.* at 260.) And for the third statement to which Defendant's attorney objected, the prosecutor was asking the jurors to assess the strength of Officer Bellissimo's memory and Defendant's memory based on the testimony they gave. (*Id.*) Because each of these statements was asking the jurors to assess credibility and memory based on the evidence and testimony presented to them, they were not expressions of the prosecutor's opinion about the evidence, and thus did not amount to prosecutorial vouching.

B. *Were the prosecutor's comments invited by Defendant's attorney comments.*

Arizona has held a prosecutor's comments do not entitle a defendant to relief when the prosecutor's comments were invited by the comments of the defendant's attorney. *State v. Henry*, 176 Ariz. 569, 582, 863 P.2d 861, 874 (1993). In the present case, Defendant's attorney gave his opinion that Officer Bellissimo was not being truthful and that Defendant was being truthful. (R.T. of Jan. 28, 2011, at 235–36, 237, 239, 240.) To the extent the prosecutor's statements could be construed as the prosecutor's opinion that Officer Bellissimo was being truthful, this Court concludes those statements were invited by the statements made by Defendant's attorney.

C. *Has Defendant waived any claim for a new trial by not making a timely request.*

In the present matter, Defendant contends she is entitled to a new trial. If the defendant fails to ask for a mistrial, the defendant will waive any claim of error on appeal. *State v. Laird*, 186 Ariz. 203, 207, 920 P.2d 769, 773 (1996) (trial court sustained defendant's objection to testimony and admonished jurors to disregard it; court rejected defendant's claim that trial court should have declared a mistrial on its own motion). In the present case, when the prosecutor made the statements, Defendant's attorney objected and the trial court sustained the objection and granted the request to strike, but Defendant's attorney, at that time, did not ask the trial court to declare a mistrial. Because Defendant's attorney did not ask for a mistrial at that time, Defendant has waived any claim of error on appeal.

D. *Did the trial court abuse its discretion in denying Defendant's motion for a new trial.*

Defendant contends trial court abused its discretion in denying her motion for a new trial. Motions for a new trial are disfavored and should be granted with great caution, that decision being within the trial court's discretion, which will not be disturbed absent an abuse of that discretion. *State v. Rankovich*, 159 Ariz. 116, 121, 765 P.2d 518, 523 (1988). In the present case, the trial court considered Defendant's claims and carefully reviewed the transcript of the statements the attorneys made. As discussed above, this Court has concluded the prosecutor's statements did not amount to vouching. The trial court thus did not abuse its discretion in denying Defendant's motion for a new trial.

III. CONCLUSION.

Based on the above, this Court concludes the prosecutor did not engage in vouching, and the trial court did not abuse its discretion in denying Defendant's motion for a new trial.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Scottsdale Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT